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# Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05-54 OF 2002(B)
ABDUL HAMID MOHAMAD, PS GILL, ALAUDDIN, RICHARD MALANJUM AND AUGUSTINE PAUL FCJJ
28 OCTOBER 2005

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*Constitutional Law — Fundamental liberties — Habeas corpus — Whether applicant can apply for ancillary orders to order of habeas corpus — Federal Constitution art 5(2) — Criminal Procedure Code s 365*

D

*Criminal Law and Procedure — Habeas corpus — Application — Whether applicable where person had been restrained under Internal Security Act 1960 s 8(5) — Whether court had jurisdiction to hear application for habeas corpus directed at another authority — Criminal Procedure Code s 365*

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The appellant was arrested on 17 April 2002 under s 73(1) of the Internal Security Act 1960 ('ISA'). On 9 April 2002, an originating motion was filed by her mother praying for the orders: (i) that access be given to her counsel to take instruction from her pursuant to art 5(3) of the Federal Constitution and, for that purpose, the appellant be brought to court; (ii) further and in the alternative that the appellant be produced in court and to be released; (iii) further and after the appellant is released, that she will not be arrested and/or detained again. The application was heard on 4 July 2001 and 12 June 2002. During that period, the appellant was still under detention pursuant to s 73(3) of the ISA. On 12 June 2002, the High Court fixed the case for its decision on 14 June 2002. On the same date (12 June 2002), the Minister in exercise of the powers given to him by s 8(5) of the ISA issued a restriction order on the appellant. On 14 June 2002, just before the learned judge delivered her decision, the respondents informed her of the fact that the appellant had been placed under a restriction order issued on 12 June 2002. The learned judge dismissed the application. The appellant appealed to the Federal Court.

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**Held**, dismissing the appeal:

(1) The writ of habeas corpus is only available to a person who is being physically detained unlawfully. A person under an order of restricted residence does not fall under the category of persons being physically detained or in actual custody. It was clear that the appellant, being a restrictee rather than a detainee could not avail herself of the writ of habeas corpus (see paras 20 and 24);*Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2004] 1 CLJ 81 and*Cheow Siong Chin v Menteri Dalam Negeri & Ors* [1985] 2 MLJ 95 followed.

I

(2) The only remedy that can be applied for under art 5(2) of the Federal Constitution and s 365 of the Criminal Procedure Code ('CPC') was habeas corpus and nothing else. The appellant had put in other prayers, for an order for access to be given to the appellant's solicitors to meet her and for an order that the appellant, after being released, should not be arrested or detained again. The fact that the appellant had also put in those prayers does not change the law. Instead, those prayers were contrary to law in an application for habeas corpus. In a habeas corpus application, the court had no jurisdiction under art 5(2) of the Constitution and s 365 of the CPC to make those other orders. The remedy may lie somewhere else. So, if the court could not, in the circumstances of the case, make the only order that it may make, ie to release the appellant, for the simple reason that she was, at the point of time when the court was to make the order, not under detention, the writ of habeas corpus becomes nugatory (see paras 27–28).

(3) Where an applicant is still in custody at the time of the decision but pursuant to an order of a different authority (the Minister), the court has no jurisdiction to hear an application for habeas corpus directed at another authority. In the instant appeal, the appellant was not even under detention at the relevant time. The order prayed for cannot be made (see para 41).

**[Bahasa Malaysia summary**

Perayu telah ditangkap pada 17 April 2002 di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Pada 9 April 2002, satu usul pemula telah difailkan oleh ibu beliau memohon untuk perintah-perintah berikut: (i) bahawa akses diberikan kepada peguamnya untuk mengambil arahan daripadanya menurut perkara 5 Perlembagaan Persekutuan dan, bagi tujuan itu, perayu hendaklah dihadapkan ke mahkamah; (ii) seterusnya dan secara alternatif agar perayu dihadapkan ke mahkamah dan dibebaskan; (ii) seterusnya dan selepas perayu dibebaskan, agar beliau tidak ditangkap dan/atau ditahan lagi. Permohonan itu didengar pada 4 Julai 2001 dan 12 Jun 2002. Dalam tempoh itu, perayu masih di bawah tanahan menurut s 73(3) AKDN. Pada 12 Jun 2002, Mahkamah Tinggi telah menetapkan kes itu untuk keputusannya pada 14 Jun 2002. Pada tarikh sama (12 Jun 2002), Menteri dengan kuasa yang diberikan padanya oleh s 8(5) AKDN telah mengeluarkan satu perintah sekatan ke atas perayu. Pada 14 Jun 2002, sejurus sebelum hakim yang bijaksana menyampaikan keputusan beliau, responden-responden memaklumkan beliau tentang fakta yang perayu telah diletakkan di bawah perintah sekatan yang dikeluarkan pada 12 Jun 2002. Hakim yang bijaksana telah menolak permohonan itu. Perayu telah membuat rayuan ke Mahkamah Persekutuan.

**Diputuskan**, menolak rayuan tersebut:

(1) Writ habeas corpus hanya terpakai untuk seseorang yang ditahan secara fisikalnya menyalahi undang-undang. Ia adalah jelas bahawa perayu, sebagai seorang yang disekat dan bukan ditahan, tidak membolehkan beliau mendapat

writ habeas corpus (lihat perenggan 20 dan 24);*Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2004] 1 CLJ 81 dan*Cheow Siong Chin v Menteri Dalam Negeri & Ors* [1985] 2 MLJ 95 diikut.

(2) Satu-satunya remedi yang boleh digunakan di bawah perkara 5(2) Perlembagaan Persekutuan dan s 365 Kanun Acara Jenayah ('KAJ') adalah habeas corpus sahaja. Perayu telah membuat permohonan lain, untuk satu perintah akses diberikan kepada peguamnya untuk berjumpa dengannya dan untuk satu perintah agar, perayu, selepas dibebaskan, tidak ditangkap atau ditahan lagi. Hakikat bahawa perayu juga telah membuat permohonan lain tidak mengubah undang-undang. Sebaliknya, permohonan-permohonan tersebut adalah bertentangan dengan undang-undang dalam suatu permohonan untuk habeas corpus. Dalam suatu permohonan habeas corpus, mahkamah tiada bidang kuasa di bawah perkara 5(2) Perlembagaan dan s 365 KAJ untuk membuat permohonan-permohonan lain itu. Tiada remedi di sini. Jika mahkamah tidak boleh, dalam keadaan kes sedemikian, membuat satu-satunya perintah yang ia boleh buat, iaitu untuk membebaskan perayu kerana pada masa mahkamah hendak membuat perintah itu, perayu bukan lagi di bawah tahanan, maka writ habeas corpus itu telah menjadi tidak berguna (lihat perenggan 27–28).

(3) Di mana perayu masih dalam tahanan pada masa keputusan dibuat tetapi menurut satu perintah pihak berkuasa yang berbeza (Menteri), mahkamah tiada bidang kuasa untuk mendengar permohonan untuk habeas corpus yang diarahkan kepada pihak berkuasa satu lagi itu. Dalam rayuan semasa, perayu bukan di bawah tahananpun pada masa berkaitan. Perintah yang dipohon tidak boleh dibuat (lihat perenggan 41).]

**Notes**

For cases on application of habeas corpus, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1901–1904.

For cases on habeas corpus, in fundamental liberties cases, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1820–1826.

**Cases referred to**

*Cheow Siong Chin v Menteri Dalam Negeri & Ors* [1985] 2 MLJ 95 (folld)

*Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2004] 1 CLJ 81 (folld)

*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 (refd)

*Onkar Shrian, Re* [1970] 1 MLJ 28 (refd)

*PP v Ottavio Quattrocchi* [2003] 3 MLJ 123 (refd)

Criminal Procedure Code s 365(a)(ii)

Federal Constitution art 5(2), (3)

Internal Security Act 1960 ss 8(1), (5), 73(1), (3)

*Edmund Bon Tai Soon (Saiful Izham Ramli and Nik Mohamed Ikhwan Nik Mahmud with him) (Saiful Kasri & Associates) for the appellants.*

*Mohamad Hanafiah bin Zakaria (Suhaimi bin Ibrahim, Raja Rozela bte Raja Toran and Najib bin Zakaria) (Attorney General's Chambers) for the respondents.*

**Abdul Hamid Mohamad FCJ (delivering judgment of the court):**

**[1]** The appellant was arrested on 17 April 2002 under s 73(1) of the Internal Security Act 1960 ('ISA').

**[2]** On 9 April 2002, an originating motion was filed by her mother praying for the following orders:

(1) that access be given to her counsel to take instruction from her pursuant to art 5(3) of the Federal Constitution and, for that purpose, the appellant be brought to court;

(2) further and in the alternative that the appellant be produced in court and to be released;

(3) further and after the appellant is released, that she will not be arrested and/or detained again; and

(4) other orders and/or direction that the court deems fit to make.

**[3]** The application was heard on 4 July 2001 and 12 June 2002. During that period, the appellant was still under detention pursuant to s 73(3) of the ISA.

**[4]** On 12 June 2002, the High Court fixed the case for its decision on 14 June 2002.

**[5]** On the same date (12 June 2002), the Minister in exercise of the powers given to him by s 8(5) of the ISA issued a restriction order on the appellant.

**[6]** On 14 June 2002, just before the learned judge delivered her decision, learned counsel for the respondents informed her of the fact that the appellant had been placed under a restriction order issued on 12 June 2002. The learned judge dismissed the application. The appellant appealed to this court.

**[7]** The judgment is in two parts. In the first part, the learned judge dealt with the issue that the application for habeas corpus was no longer maintainable as the appellant was no longer under detention. She dismissed the application on that ground.

**[8]** In the second part, in case she was wrong in so holding, she dealt with the grounds of the application and, finding that they were without merits, held that the application should be dismissed too.

**[9]** We decided to hear the argument on the first issue first, ie whether the appeal was maintainable in view of the fact that the appellant was no longer under detention.

**[10]** Learned counsel for the appellant argued that the appeal was maintainable. He argued that the relevant and material date to be considered for the purpose of deciding the legality of an order of detention in a habeas corpus application was the date when the application was heard. As in this case, on the dates the application was heard, the appellant was still under detention (under s 73) the High Court had the jurisdiction to entertain and decide on the application, even though on the date of the decision, the appellant was no longer under detention. While admitting that the law was not settled, he submitted that there was no authority which supported the proposition that the relevant date was the date of the decision of the application. He distinguished the case of*Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95 on the ground that, in that case, the application for the issue of the writ of habeas corpus was filed after the restriction order had been issued and served. He also distinguished*Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2004] 1 CLJ 81 (FC) on the ground that in that case the application for the issue of the writ of habeas corpus was filed prior to the issue of the detention order under s 8, the application was heard and the decision was given after the issue of the detention order.

**[11]** In the alternative, learned counsel argued that this court should proceed to hear the appeal on all the grounds raised in the petition of appeal because there were important questions for the determination of this court. The questions, according to him are:

(a) which affect the personal liberty of a person;

(b) which revolve around points of constitutional law;

(c) which requires a scrutiny of the constitutionality and legality of s 73(1)(b) ISA;

(d) which requires a scrutiny of the application of the ISA in respect of the appellant;

(e) which requires an interpretation of this court's decision in Ezam (on the objective and subjective test and on the access to counsel point); and,

(f) which reconsiders this court's decision in Nasharuddin (on the jurisdiction point).

It is likely that these issues would have to be resolved in the near future as there is currently a large number of similar cases which are anticipated, and many ISA detainees detained under similar circumstances. This is also a public interest case where the appellant (who is the wife of an ISA detainee) was the first woman detained under the ISA for her alleged involvement with the Kumpulan Militan Malaysia (KMM).

**[12]** The learned counsel relied heavily on*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 (FC) and argued that, in that case, this court went so far as to issue the writ of habeas corpus and order the release of the detainees despite the detainees not being in the custody of the police. Learned counsel also argued that in the instant appeal, there was (and is) a valid High Court judgment which was wrong in the light of *Mohamad Ezam* as the learned judge applied the subjective test which was the wrong test. The learned judge's judgment in the instant appeal must be reversed to correct the miscarriage of justice. It was further argued that the issuance of the restriction order was calculated to frustrate the

proceedings. This amounted to an interference with the administration of justice and contempt of court. The respondents could not be allowed to benefit from their wrongdoing.

**[13]** This is an application for the issue of a writ of habeas corpus, pursuant to s 365 of the Criminal Procedure Code ('CPC'). That section, inter alia, provides:

> 365 The High Court may whenever it thinks fit direct —
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> (i) that any person who
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> (a) …
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,
>
> be set at liberty.

**[14]** Besides, art 5(2) of the Federal Constitution provides:

> 5(1) …
>
> (2) where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful shall order him to be produced before the court and release him.

**[15]** Under both provisions, only one remedy is provided, ie to set the detainee at liberty or to release him which actually means the same thing. Indeed, that is what habeas corpus is about: to release a person who is being detained 'illegally or improperly', to quote the words of s 365(a)(ii) of the CPC. The person must be under detention. Only then can he be released if the detention is found to be illegal or improper.

**[16]** A number of cases were referred to us. I think, the case of *Re Onkar Shrian* [1970] 1 MLJ 28, a judgment of the High Court of Singapore is very pertinent on this issue. In that case, the applicant was arrested in Singapore for an offence alleged to have been committed in Kuala Lumpur, Malaysia. He was produced before a Magistrate in Singapore on the same day. On the same day, the applicant was released on cash bail and the proceedings were adjourned to the following day. On the following day, the applicant appeared in the magistrates' court where the deputy public prosecutor applied for an order to return the applicant to Malaysia. The application was opposed by the applicant. The court adjourned to another date to enable the applicant to apply for habeas corpus. The applicant applied for an order that the writ of habeas corpus be issued against the respondent (the magistrate) to produce the applicant and thereafter to be released. It must be noted that during the material time, ie when the application was made and heard, the applicant was on bail and 'not in actual custody.'

**[17]** Choor Singh J dismissed the application on the ground that a person at large on bail is not detained in custody so as to be entitled to the writ of habeas corpus which is issued only when the applicant is in illegal confinement. We shall not repeat the reasons given by the learned judge which can be found at pp 30–31 of the report.

**[18]** Indeed, in *Nasharuddin*, Steve Shim (CJ Sabah & Sarawak) had made it clear, at p 89:

> It is trite law that the remedy of habeas corpus is intended to facilitate *the release of persons actually in unlawful custody. It is the fact of detention which gives the court its jurisdiction* (see *Barnado v Ford* [1892] AC 326. The observation made by Choor Singh in *Re Onkar Shrian* [1970] 1 MLJ 28 is particularly instructive. (Emphasis added.)

**[19]** The learned CJ (Sabah & Sarawak) then quoted part of the judgment of Choor Singh J, and concluded at p 90 of the report:

> In the result, Choor Singh J took the position that a writ of habeas corpus had to be addressed to the person or authority having actual physical custody of the person alleged too be detained illegally. That, in my view, represents a correct statement of the law. In a situation where the court finds it impossible to issue the writ because the person or authority no longer has custody of the detainee, it should not hear the application. Indeed, it has no jurisdiction to do so. This is precisely the position in the instant case. Here, the facts show that when the application came up for full argument before the court, the police no longer had custody of the respondent. Custody had been transferred to the Minister upon the issuance of a detention order under s 8 of the ISA. In the circumstances, it would have been appropriate for the respondent to file a fresh notice of motion for a writ against the detention order issued by the Minister. In the absence of such a motion, the court had embarked on a misconceived course of action in assuming jurisdiction.

**[20]** We entirely agree with his views. So, the writ of habeas corpus is only available to a person who is being physically detained unlawfully. He must be in actual custody.

**[21]** Does a person under an order of restricted residence fall under the category of persons being physically detained or in actual custody?

**[22]** This issue has also been answered by the Supreme Court in *Cheow Siong Chin*. In that case, orders had been made under the Restrictive Residence Enactment: (a) requiring the appellant to reside in the town of Gua Musang for a period of three years from the date of the order; and (b) directing him to be placed under police supervision for the same period. The appellant applied for a writ of habeas corpus to challenge the orders made against him. The application was dismissed by the High Court and the appellant appealed to the Supreme Court. The Supreme Court held that the restraint imposed by reason of an order of restricted residence under the Restrictive Residence Enactment did not constitute detention of such a nature so as to attract the application of the writ of habeas corpus. The writ of habeas corpus was therefore not available to the appellant in the circumstances. Abdoolcader SCJ (delivering the judgment of the court), having referred to the judgments of the courts in Singapore, India, England and the United States, concluded at p 98:

> On a consideration of the authorities we have adumbrated, none of which, except for two, were referred to in the court below or before us, we are of the view that the restraint imposed by reason of an order of restricted residence under the Enactment does not constitute detention of such a nature as to attract the application of the writ of habeas corpus. The writ of habeas corpus is accordingly not available to the appellant in the circumstances. ….

**[23]** It is clear from the judgment of the Supreme Court that a person who is subjected to a restriction order is not being physically detained, imprisoned or in custody and as such a writ of habeas corpus is not available to him. The learned judge did suggest that the appellant in that case may seek other remedies, eg certiorari.

**[24]** Having considered these authorities with which we entirely agree, it is clear that the appellant in the instant appeal, being a restrictee rather than a detainee cannot avail herself of the writ of habeas corpus.

**[25]** However, it was argued by learned counsel for the appellant that the material time for consideration is not the date of the decision but the date of hearing.

**[26]** First, we do not think we should or could separate the date of hearing from the date of decision. The date fixed for a decision in fact forms part of the hearing. As always happens, even on the date fixed for decision, counsel still seek, and are usually allowed, unless the request is unreasonable, to make further submissions or to clarify a fact or to bring to the court's attention of a newly discovered authority or, as in this case, to inform the court of the latest development. The hearing of an application certainly includes the decision thereof.

**[27]** Secondly, what is more important is that the only remedy that can be applied for under art 5(2) of the Constitution and s 365 of the CPC is habeas corpus and nothing else. Of course, the appellant has put in other prayers, for an order for access to be given to the appellant's solicitors to meet her and for an order that the appellant, after being released, shall not be arrested or detained again. The fact that the appellant has also put in those prayers does not change the law. Instead, those prayers are contrary to law in an application for habeas corpus. In a habeas corpus application, the court has no jurisdiction under art 5(2) of the Constitution and s 365 of the CPC to make those other orders. The remedy may lie somewhere else.

**[28]** So, if the court could not, in the circumstances of the case, make the only order that it may make, ie to release the appellant, for the simple reason that she was, at the point of time when the court was to make the order, not under detention, the writ of habeas corpus becomes nugatory, just as the court cannot sentence a dead man to death. It is no argument to say that he was alive during the trial but died just before the court delivers its judgment. The arguments clearly has no merits.

**[29]** It was also argued that there was and is a judgment in existence that justifies the detention which must be put right. If learned counsel is of that opinion, there is nothing to stop him from choosing the proper procedure for such a determination. All that is said here is that a habeas corpus application is not the proper method and habeas corpus is not the remedy.

**[30]** It was also argued that the Minister in issuing the restriction order commits contempt of court because, by doing so, he prevents the court from deciding the case. With respect, we find the argument most preposterous. Does the public prosecutor commit contempt of court when he withdraws the charge against an accused person

in the middle of a trial or on the date fixed for decision? Does the police commit contempt of court if, at the expiry of the 60 days' detention under s 73 of the ISA, the detainee is released, no detention order being made against him by the Minister under s 8? Does an appellant who withdraws his appeal on the date fixed for the hearing of his appeal commit contempt of court for the same reason? Do parties in a civil suit or appeal commit contempt of court when, on the date fixed for the decision, they report to the court that they had amicably settled the case and ask for the case or appeal to be struck out? The answer is obvious: No.

**[31]** We do not think it is necessary to discuss all the cases referred to us regarding the circumstances under which courts do decide on matters though academic. However, we will discuss some of them, which we consider to be more relevant.

**[32]** The learned counsel for the appellant relied very heavily on *Mohamad Ezam* in urging us to hear the appeal on its merits. He argued that in *Mohamad Ezam*, even though one of the appellants had been released, the court went on to hear the appeal on its merits and even issued the writ of habeas corpus. He read to us the order made by Mohamad Dzaidin Chief Justice in support of his contention.

**[33]** However, it must be noted that, in Mohamad Ezam the following orders were made by the learned judges:

(a) by Mohamad Dzaiddin Chief Justice (at p 332):

> Accordingly, I would allow these appeals and issue the writ of habeas corpus for the appellants to be set at liberty and be released.

(b) by Steve Shim CJ (Sabah and Sarawak) (at p 345):

> In that context, I agree that the appeal should be allowed and the appellants released accordingly. However, as the undisputed facts show that the appellants, ie first, third, fourth and fifth appellants have now been detained by order of the Minister under s 8 of the Act, the issue of whether or not to grant the writ of habeas corpus for their release from current detention does not concern us. That is a matter of a different exercise.

(c) by Abdul Malek Ahmad FCJ (at p 380):

> In view of the above considerations, I am of the opinion that all the five appeals ought to be allowed. Accordingly, the first, third, fourth and fifth appellants are hereby released.In view of the above considerations, I am of the opinion that all the five appeals ought to be allowed. Accordingly, the first, third, fourth and fifth appellants are hereby released.

(d) by Siti Norma Yaakob FCJ:

> Under the circumstances habeas corpus will issue to secure their release, insofar as the first, third, fourth and fifth appellants are concerned.

**[34]** So, even though all the learned judges agree that the appeal be allowed, three different orders were made: First, by Mohamed Dzaiddin Chief Justice that 'the

appellants to be released', which on the face of it appears to refer to all the appellants, including the second appellant who had since been released from police detention. Learned counsel for the appellant in the instant appeal relied on this order of the learned Chief Justice to support his argument that the instant appeal should be heard on merits even though, when questioned as to what order he would ask this court to make in the instant appeal, replied that he was not asking that the order for the release of the appellant to be made but only for the court to allow the appeal. That concession by itself shows that even the learned counsel himself realised that when the learned Chief Justice used the word 'appellants' in *Mohamad Ezam*, he could not have meant as including the second appellant who had been released. One simply cannot order the release of a person who is not under detention, just as one cannot release a fish swimming freely in the sea even though, once upon a time, it was in an aquarium.

**[35]** Steve Shim CJ (Sabah & Sarawak) did not make any order to release any of the appellants at all.

**[36]** Abdul Malek Ahmad FCJ and Siti Norma Yaakob FCJ, in their respective orders, specifically referred to the first, third, fourth and fifth appellants.

**[37]** Learned counsel for the appellant also relied on Nasharuddin in urging this court to hear the appeal on merits. In that case, the objection was that it was improper to cite the Minister in the motion because at the time the motion was filed, the detainee was under detention by the police pursuant to s 8 and not under the order of the Minister under s 73. The relevant part of the judgment of Steve Shim CJ (Sabah & Sarawak) delivering the judgment of the court, at p 90 of the report has been reproduced.

**[38]** It is pertinent to note that, in that case, this court went so far as to hold that once the detention order was issued by the Minister, the court no longer had jurisdiction to hear an application made to challenge the detention by the police under s 73, even though the detainee was in fact still under detention.

**[39]** The net effect of the judgment of this court in *Nasharuddin* is that this court, even though it did not say so in so many words, had disapproved the ruling of the court in *Mohamad Ezam* in respect of the preliminary objection by the Honourabble Attorney General. In *Mohamad Ezam*, the Honourable Attorney General had raised a preliminary objection on the ground that the second appellant had been released four days earlier and was therefore no longer under detention. The second ground was that the remaining appellants were being detained under the order of the Minister under s 8(1) and were no longer under police custody under s 73. However, the application for habeas corpus was directed at the Inspector General of Police who no longer had the custody of the appellants under s 73. As a result, the appeal had been rendered academic. This court overruled the preliminary objection, after a short recess, on the ground that 'the issue was still alive'. As is usually the case in such a ruling, no grounds were given.

**[40]** In *Nasharuddin*, which was decided two years later and all the three judges who sat in *Nasharuddin* were in fact, among members of the panel that heard and decided *Mohamad Ezam*. In *Nasharuddin*, this court very clearly held that the legality or illegality of the detention under s 73 was irrelevant in determining the legality or illegality of the detention order by the Minister under s 8. This is what the learned CJ (Sabah and Sarawak) said on the issue:

> I must confess I am unable to comprehend the rationale behind the learned judge's statement that 'if the roots are bad, surely the fruits too will be bad'. If it is meant to be an axiomatic proposition for all purposes, then it cannot possibly be true because one can envisage many situations which do not necessarily fall into such a dogmatic characterization especially where human conduct and behaviour is concerned. Quite conceivably, as counsel for the respondent has submitted, the expression is meant to support the proposition that the illegality of the s 73 detention order had adversely affected the detention order issued by the Minister under s 8 or conversely, that the s 8 detention order was tainted as a result of the illegality or irregularity of the s 73 detention order. If that be the case, then it would appear that the learned judge had failed to examine the factual circumstances in the context of the principles enunciated by the Federal Court in Karam Singh. It is not disputed that there is affidavit evidence that the Minister, on the basis of the report submitted to him, was satisfied that the activities of the respondent were a threat to the security of the country. Whether or not the allegations in the said report on which the s 8 detention order was based, were sufficient or relevant, was a matter to be decided solely by the Minister. In this case, he was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open to the court to examine the sufficiency or relevance of the allegations contained in the report. None of these considerations appear in the judgment of the learned judge.

The passage of the judgment at p 90 of the report quoted above is also pertinent on this point.

**[41]** So, even where the applicant was still in custody at the time of the decision but pursuant to an order of a different authority (the Minister), the court has no jurisdiction to hear an application for habeas corpus directed at another authority (the police). To that extent, *Mohamad Ezam* has been disapproved by this court in *Nasharuddin*. We prefer the view taken by this court in Nasharuddin on this issue in preference to that taken in *Mohamad Ezam*. In the instant appeal, the Appellant is not even under detention at the relevant time. The order prayed for simply cannot be made.

**[42]** The case of *Public Prosecutor v Ottavio Quattrocchi* [2003] 3 MLJ 123 (CA) was also relied on by the learned counsel for the appellant in urging this court to hear the appeal on merits, even though the issue may be academic. But, that case clearly does not support the appellant's contention. The order in question in that case was not academic. This is what the judgment said:

> On the question whether the order is academic, we are of the view that we will have to consider the nature of the order in the light of the circumstances of the case. There is no doubt that the purpose of the order was to prevent the respondent from leaving the country pending the disposal of the appeal. But, the order is not in the form of an injunction to restrain the respondent from leaving the country. If that is the nature of the order, then there is no doubt that it is academic. But, the order is for the respondent to surrender his

international passport. There is no time limit for him to do so. He may choose to return to Malaysia and surrender his passport or he may return and the order may be enforced on him.

In this case, the respondent had come to and lived in Malaysia since 1993 and there is evidence that he is the principal director of EATI Sdn Bhd and that he conducted all his business dealings in Malaysia through this company, even though the company is in a poor financial state — para 10(4) of the affidavit of En Kamarul Hisham, the Deputy Public Prosecutor. In other words, considering the nature of the order and the circumstances of the case, the order is not academic in the sense that it cannot be complied or enforced at all. It would be different if the respondent were a mere tourist on a short stay with no residence, no address and no business in Malaysia and has left the country for good, under which circumstance, the order may be academic.

In the circumstances, we are of the view that the order is not academic.

So that case does not assist the appellant.

**[43]** For these reasons, in my judgment, the appeal should be dismissed on this one ground alone.

*Appeal dismissed.*

Reported by Peter Ling